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**Subject:** [External] Procedural questions on FERC, environmental justice, & tribal consultation

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Dear Eric, Kevin, and Liz,

I'm reaching out again with some procedural questions regarding the proposed Atlantic Coast Pipeline (CP15-554-000 etc.). Over the past year or so, I've had conversations about procedural issues involving environmental justice and tribal consultation with a number of parties, including several federal, state, and tribal entities (some of whom are CC'ed here). Our conversations end in questions unanswered by any of the project filings. I believe that FERC is the only entity equipped to answer these questions.

I understand that FERC's quasi-judicial role limits your ability to communicate with me, but I have reframed questions to focus on procedural issues rather than merits. Your answers to these questions will help me to help tribes understand FERC's decision-making process. It is important for tribes to have accurate answers to these questions, especially in North Carolina, which has the largest Native American population in the eastern United States.

**1) Does FERC intend to correct flaws its environmental justice analyses? Why or why not?** In April 2017, I sent FERC detailed comments describing errors in the environmental justice analysis included in your agency's DEIS for the Atlantic Coast Pipeline. A summary of my work was [published as a letter](#) in the academic journal, Science. In brief, the agency's calculations are incorrect because key statistics were not population-weighted, invalidating the analysis. Those errors were unaddressed in the FEIS apart from one minor issue of counting majority-minority census tracts. Failure to correct the errors concerns me, because the still-flawed analysis was used to support environmental justice conclusions in the FEIS and the record of decision. Moreover, as I'm sure you are aware, the EPA advises agencies to [conduct follow-up analyses](#) where demographic data suggest even possible environmental injustice, and to my knowledge no follow-up occurred.

**2) Will FERC acknowledge unmet requests for tribal consultation?** Although the tribes that I work with are not federally recognized, federal advisory groups [recommend formal consultation](#) in cases where state-recognized tribes have demonstrated interests. At least two of the tribes (Lumbee and Haliwa-Saponi) made direct requests - in writing - for formal consultations with FERC regarding the Atlantic Coast Pipeline's



DEIS. Several months ago, the [NC Commission of Indian Affairs](#) (April 2017) and the [National Congress of American Indians](#) (June 2017) urged FERC to consult directly with these and other tribes. As you are certainly aware, tribal perspectives are not appropriately expressed through public comment or through conversations with developers; tribal consultation is the government-established vehicle for such discussions. Moreover, lists of communications with tribes (e.g., FEIS Appendix V) are helpful information but [not a meaningful indicator that consultation has occurred](#).

**3) Will FERC ask the pipeline developer to amend their October 13, 2017 supplemental filing, "Summary of Consultations with the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and Meherrin Tribe" to remove references to term "consultation" and include additional details about the content of these meetings?** A [comprehensive analysis](#) of US tribal consultation policy published in the University of Michigan Journal of Law Reform concludes that "a meeting between private contractors and Indian tribes, without the presence of federal officials, does not constitute consultation." That conclusion complements official [NEPA](#) and [NHPA](#) policy guidance. Therefore, FERC's request that the developer meet with tribes should not be construed as "consultation." The developer should also remove this reference from their filings. Moreover, the filing fails to mention that discussions between tribal leaders and developers often focused on the number and concentration of Native Americans living along the proposed route, as well as FERC's unresponsiveness to requests for formal consultation. The [August 9 meeting of NC tribal leaders](#) (to which you were invited) is a key example provided by the developer to illustrate its engagement with tribes, yet the filing omits important details about environmental justice and tribal consultation. (As an aside - The selective filtering of tribal peoples' information from the developer to the agency is a prime example of why this strategy should not substitute for consultation. It also validates concerns many tribes have about corresponding with developers outside the boundaries of formal consultation.)

**4) If FERC has decided that it will not to consult with North Carolina tribes, is the decision based on the tribes' lack of full federal recognition?** There is substantial uncertainty about this among North Carolina tribes. There is no statutory requirement to consult with these tribes, but it is recommended by the ACHP. If FERC's position is not to consult specifically because of recognition status, a clear articulation of that policy would clear things up for many people here in North Carolina. If FERC believes that it has followed policy guidance and engaged in consultation with North Carolina tribes, please elaborate.

You may or may not know that generations of North Carolina's tribal citizens have been excluded from state and federal decision-making because of discriminatory public policies (disenfranchisement, segregation, termination, etc.). Our communities are still dealing with the legacies of these policies as they affect intergenerational community health, education attainment, the siting of existing and proposed infrastructure (industrial, energy, waste), and more. These remain major issues across Indian Country irrespective of federal acknowledgement status.

Ex parte rules notwithstanding, I believe that FERC's unresponsiveness to tribal leaders', inter-tribal commissions', and other agencies' questions about environmental justice and tribal consultation furthers the perception and, potentially, the reality that Native American tribes continue to be excluded from decision-making on matters affecting their citizens as well as their present and ancestral territories.

In closing, I would be happy to discuss ways to correct mathematical errors in FERC's environmental justice analyses or to point out alternative tools such as EPA's EJSCREEN. I am also available to help you think about ways that the agency could improve communications with tribes here in North Carolina. Although I don't speak on behalf of any of these tribes, I ultimately hope to see productive and direct communication between tribes and agencies to ensure that indigenous peoples have a seat at the table when it comes to our nation's energy future.

Kind regards,

Ryan

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